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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942—No. 934.

CLEM LOCKERTY, ANTHONY CARUSO, EDWARD A. CARROLL and others,

Appellants,

vs.

CHARLES M. PHILLIPS, United States Attorney for the District of New Jersey,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLANTS.

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vs.

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Appellee.

On Appeal from the District Court of the United States for the District of New Jersey.

BRIEF FOR APPELLANTS.

1.

The Opinions of the Court Below.

The opinions of the three-judge statutory court are unreported. The majority opinion appears in the record at page 37 and the dissenting opinion appears in the record at page 40.

2.

Statement of Jurisdiction.

The judgment of the statutory three-judge District Court to be reviewed was entered on April 2, 1943 (R. 4). Application for the allowance of an appeal was filed and presented on April 9, 1943 (R. 4). The order allowing appeal was dated and filed April 9, 1943. The jurisdiction of this court is invoked under 50 Stat. 754, 28 U. S. C. App. 380(a).

Statutes Involved.

The relevant portions of the Emergency Price Control Act of 1942 and the Inflation Control Act of 1942 are set out in the appendix.

Statement of the Facts.

The question presented for determination by this appeal is whether the statutory three-judge district court erred in holding that Section 204(d) of the Emergency Price Control Act of 1942 withdrew from the district court the jurisdiction and power to grant the relief prayed for in the complaint herein and in dismissing the complaint for want of jurisdiction.

On March 8, 1943, appellants filed the complaint on their own behalf as well as on behalf of all those similarly situated and twenty-five others have intervened in the action (R. 2-5). On March 26, 1943, by leave granted in open court at the hearing before the statutory three-judge district court, the amended and supplemental complaint was filed (R. 3). By stipulation of counsel, only the amended and supplemental complaint has been printed, so for brevity it will be referred to herein as the complaint.

Analysis of the Complaint.[1]

Appellants are citizens and residents of the State of New Jersey, and the amount in controversy as it affects each of them exceeds, exclusive of interest and costs, the sum of $3,000.00, and the action arises under the Constitution of the United States, Article I, Section 1; Section 8, Clause 18; Section 10, Clause 1; Article III, Section 1; Section 2, Clause 3; the Fifth, Sixth and Eighth Amend-

[1] The Amended and Supplemental Complaint is set forth in full at pages 9 to 37 of the Record.

ments to the Constitution of the United States; the Emergency Price Control Act of 1942 as amended and Executive Order No. 9250 issued October 3, 1942.

Appellants are and have been for a great many years engaged as wholesale merchants in buying and selling meats in the northern part of the State of New Jersey. In connection with his business, each maintains a substantial structure containing the necessary equipment for the handling and distribution of meat and each employs a substantial force of salesmen, meat handlers, drivers and other personnel necessary in the conduct of his business. Each is worth upwards of $25,000.00, has hundreds of customers, a well established trade and has created and owns in addition to his tangible property and assets, goodwill of great value, constituting one of his most important assets.

Appellants are not slaughterers of cattle or livestock but purchase dressed meat which has been inspected and passed under federal laws from packers who in turn purchase the cattle for slaughtering purposes from cattle raisers, feeders and others engaged in the business of scientifically breeding, raising and preparing cattle and marketing them for slaughtering purposes.

The price at which meat can be distributed by the wholesaler to the retailer and by him in turn to the consumer, depends entirely upon the following factors:

(a) The market price paid by the packer for the livestock, in which must be included the cost of the agricultural commodities used in scientifically raising, breeding and feeding such livestock, as well as the expenses of maintaining, handling and transporting same to the point where said livestock is purchased by the packers.

(b) The cost of the packer in acquiring and transporting same to his establishment, and the cost

of killing, dressing, processing and distributing the dressed meat to the wholesaler.

(c) The cost of the wholesaler in acquiring, cutting, preparing, handling and delivering the dressed meat to the retailer.

(d) The cost of the retailer in finally selling the produce to the ultimate consumer.

The supply of appellants' meat products and of all others similarly situated is controlled and limited entirely by the number of cattle the packers conclude to slaughter. The number of cattle which the packers will undertake to slaughter in turn depends on whether it is reasonably profitable for them to do so.

On or about April 28, 1943, the Administrator, assuming to act under the power allegedly delegated to him by the Emergency Price Control Act,[1] promulgated the General Maximum Price Regulation, under the terms of which he arbitrarily exempted and excepted from the operation thereof certain commodities "for reasons of administrative impracticability resulting from lack of standardization of units, the frequency and small size and character of the transactions involved, or some other factors. Examples of commodities excepted at all stages for administrative reasons include rare stamps, coins and books; antique furniture; live animals and the like. Other exceptions from the regulations are attributable to the fact that the commodities involved are subject to regulation at a subsequent stage of production or distribution where effective control may more feasibly be exercised. Such commodities include raw and unprocessed greenhouse or agricultural commodities."

[1] The Emergency Price Control Act of 1942; The Inflation Control Act of 1942 and the Executive Order of October 3, 1942 are set out in the Appendix.

On or about June 19, 1942, the Administrator, still assuming to act under the power allegedly delegated to him, promulgated Maximum Price Regulation No. 196, which purported to become effective on and after July 13, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulation. Thereafter the Administrator, assuming to act under the authority of the Act, as amended and Executive Order No. 9250 promulgated Revised Maximum Price Regulation No. 169 effective December 16, 1942, wherein he purported to prohibit the sale or delivery of any wholesale cut of beef at a price higher than the maximum price set forth in said regulation.

Notwithstanding the inter-relationship between the price of livestock and the agricultural commodities used in breeding, raising and feeding said stock and the prices at which the wholesaler and packer could sell the dressed meat, neither in Maximum Price Regulation No. 169, Revised Maximum Price Regulation No. 169, nor in any other price regulation at any time, was there established by the Administrator any maximum price for the sale of such commodities and livestock. Under the set-up of the meat industry, there is such an inter-relation between the various stages in the operation of said industry that the inevitable result of the design and scheme of said Act would be such a rise in the prices of livestock and other agricultural commodities used in breeding, raising and feeding said livestock, that the packer would be unable to slaughter and process livestock without great loss and therefore would refuse to slaughter the same, bringing about a complete shutting off of the supply of meat to appellants and others similarly situated, thereby forcing them out of business. Another inevitable result of the design and scheme of said Act would be to cause a complete shutting off of the supply of meat

to the general public. What was thus contemplated and intended by the Act has in fact come to pass and appellants and others similarly situated have been on the verge of being forced out of business and many others similarly situated have been already forced out of business. In addition, the supply of meat to the general public has been substantially stopped, making it virtually impossible for the general public to procure meat.

The Administrator's assistants, in conducting their investigation trailed the trucks of the appellants and required hundreds of appellants' customers to come to the Newark office and bring with them various records. As a result of the publicity attendant upon the investigation, appellants lost many of their customers.

Thereafter, criminal informations were filed against appellants containing multiple counts and appellants were subsequently indicted. The indictments contained multiple counts, each count being based upon an alleged single sale of meat. Other counts in some of the indictments charge that appellants failed to make and preserve accurate records of sales of meat.

In the business of each of the appellants, hundreds of sales similar to those referred to in the indictments take place daily. Each sale made by appellants and others similarly situated may, under the provisions of Section 205(b) of the Act and the regulations promulgated thereunder, involve and constitute a separate offense and as a result, appellants are subject to the possibility of prosecution for each and every one of the many transactions in which they daily necessarily take part.

The Administrator's assistants have publicly declared that it was the intention of the Administrator to drive appellants and others similarly situated out of business. In

addition, appellee has stated that he will not only press for an early trial of the present indictments, but will seek other and further indictments against appellants and others similarly situated.

The indictments and the threatened prosecution by appellee of appellants must be based upon the assertion and contention that the said Emergency Price Control Act of 1942, insofar as it applies to appellants, is valid and effective.

Appellants have filed motions to quash and abate the indictments found against them upon the grounds, *inter alia*, that they did not charge an offense against the public laws of the United States because the Emergency Price Control Act and the regulations promulgated thereunder, upon which the indictments are based, are unconstitutional, invalid and void. Because the unconstitutionality o the Act and the regulations promulgated thereunder a e not in some respects patent, but must be established b competent evidence which can be produced, the trial court may decline to pause in the trial upon the indictments to receive such evidence and appellants thereby will be unable adequately and properly to present such issue to the trial court for its determination.

Appellants have earnestly and honestly endeavored to exact no unlawful or excessive prices for their merchandise, and by reason of the facts set forth, appellants have no adequate remedy in the courts of law. Unless the relief sought is granted, they will be inevitably subjected to irreparable loss and damage for which they would and could have no remedy whatsoever.

Proceedings on the Complaint.

Upon the filing of the complaint application was made to the District Judge for a temporary restraining order and he immediately requested the Senior Circuit Judge to designate two other judges to participate in hearing and determining such application.

On March 10, 1943, an order was duly entered designating three judges to hear the case and on March 11, 1943, on notice to appellee, application was made to the District Judge for a temporary restraining order until the hearing by the full court. The appellee agreed not to prosecute the indictments until after a hearing before the full court and the District Judge thereupon ordered that the application for the temporary restraining order be continued to be heard before the full court at the same time set for the hearing on appellee's motion to dismiss the complaint which was filed that day (R. 2).

The hearing on appellee's motion to dismiss and appellants' motion for an interlocutory injunction was held on March 26, 1943. On March 29, 1943, the court filed its opinion, one judge dissenting, holding that Section 204(d) is constitutional and that it withdrew from the court the jurisdiction and power to grant the relief prayed for and ordering that the complaint be dismissed for want of jurisdiction.

Specification of Errors.

1. The District Court erred in dismissing the amended and supplemental complaint herein.

2. The District Court erred in ordering and adjudging that the motion of the defendant to dismiss the amended and supplemental complaint should be granted and in dis-

missing the amended and supplemental complaint herein for want of jurisdiction.

3. The District Court erred in ruling that Section 204(d) of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23, 50 U. S. C. App. 924(d)) has withdrawn from said court jurisdiction and power to grant the relief prayed for in the amended and supplemental complaint herein.

4. The District Court erred in dismissing the amended and supplemental complaint herein, thereby denying appellants an injunction prohibiting the appellee from enforcing or attempting to enforce against the appellants herein, or either or any of them, the provisions of the Emergency Price Control Act of 1942 (C. 26, 56 Stat. 23; 50 U. S. C. Sec. 901, *et seq.*), as amended by the Act of October 2, 1942 (C. 578, 56 Stat. .....; 50 U. S. C. App. Secs. 961, *et seq.*).

5. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it purports to improperly delegate the legislative power to the Price Administrator in violation of Article I, Section 1, of the Constitution of the United States.

6. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that the Emergency Price Control Act of 1942 as amended is unconstitutional and invalid because it is in conflict with the Fifth Amendment to the Constitution of the United States in that the attempted classification made in said Act is unjust, unreasonable and arbitrary, and deprives appellants and each of them as well as others similarly situated of their liberty and their property without due process of law and deprives them of their private property without just compensation.

7. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of Section 1 and Section 2, Clause 3 of Article III of the Constitution of the United States, in that said section deprives appellants of a full, fair, complete and impartial trial on all the issues involved in the indictments returned against appellants on February 9, 1942, within the State and District wherein said alleged crimes were committed.

8. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Fifth Amendment to the Constitution of the United States in that it deprives and denies to the appellants herein the right to defend themselves by establishing that the grand jury has failed to return an indictment against them charging a violation of the public law of the United States.

9. The District Court erred in dismissing the amended and supplemental complaint and in refusing to adjudge that Section 204 of the Emergency Price Control Act of 1942 is unconstitutional and invalid because said section is in conflict with and repugnant to the provisions of the Sixth Amendment to the Constitution of the United States in that it deprives and denies to the appellants herein the right to a public trial in a criminal prosecution in the State and District wherein the crime is alleged to have been committed upon all of the issues embraced within said indictments and the offenses charged therein.

SUMMARY OF ARGUMENT.

INTRODUCTORY STATEMENT. The complaint herein sets forth a cause of action cognizable in equity. The power of a federal court of equity to grant relief from the enforcement of an unconstitutional statute is well established where the circumstances of the case demonstrate, as they do here, that the appellants will suffer irreparable loss and damage unless enforcement of the Act is stayed pending judicial review as to its constitutional validity.

POINT I. The lower court erred in holding that section 204(d) of the Emergency Price Control Act of 1942 withdrew from the court jurisdiction and power to entertain the complaint and grant the relief prayed for and in dismissing the complaint for want of jurisdiction.

A. Section 204(d) as construed and applied by the District Court is invalid because it infringes upon the judicial power vested exclusively in the Judicial Department of the Government by Article III, Section 1, of the Constitution of the United States.

B. Section 204(d) as construed and applied by the District Court denies appellants the right to an injunction pending judicial review of the Emergency Price Control Act of 1942, thus depriving appellants of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

C. Section 204(d) deprives appellants of their right at the trial of the indictments found against them to raise as a defense the invalidity of the regulations issued by the Price Administrator, thus depriving appellants of their

property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and denies to appellants a full, fair, complete and impartial trial on all the issues involved on the indictments returned against them within the State and District wherein the alleged crimes were committed, in violation of Article III, Section 2, Clause 3 of the Constitution of the United States and in violation of the Sixth Amendment to the Constitution of the United States.

D. Section 204(d), being an integral part of the Act, is invalid because of the invalidity of the substantive provisions of the Act.

POINT II. The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator in violation of Article I, Section 1, of the Constitution.

POINT III. The Emergency Price Control Act makes an unconstitutional, discriminatory classification in fixing prices on agricultural commodities and commodities processed or manufactured from any agricultural commodity.

ARGUMENT.

Introductory Statement.

There can be no doubt that a federal district court has the inherent constitutional power to enjoin the enforcement of an alleged unconstitutional act pending a judicial determination of its validity. *Ex parte Young*, 209 U. S. 123 (1908); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912); *Terrace* v.

Thompson, 263 U. S. 197 (1923); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Gibbs* v. *Buck*, 307 U. S. 66 (1939); *Beal* v. *Missouri*, 312 U. S. 45 (1941); *Porter* v. *Investor's Syndicate*, 286 U. S. 461 (1932); *Prentiss* v. *Atlantic Coast Line*, 211 U. S. 210 (1908); *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923); *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104 (1939); *Davis* v. *Wakelee*, 156 U. S. 680 (1895); *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937); *Liggett Co.* v. *Baldrige*, 278 U. S. 105 (1928); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 (1935); *Watson* v. *Buck*, 313 U. S. 387 (1941); *Tedrow* v. *A. T. Lewis & Son Dry Goods Co.*, 255 U. S. 98 (1921); *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935); *State of Oklahoma* v. *Guy F. Atkinson Co.*, 37 F. Supp. 93 (D. C. E. D. Okla., 1941); aff'd 313 U. S. 508 (1941); *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 F. 321 (C. C. A. 8, 1911).

It is also equally clear, as will be demonstrated under Point I (A) and (B) herein, that this inherent constitutional power of the federal equity courts cannot be taken away or infringed upon by the legislative or executive branches of the federal government. That judicial power, vested exclusively in the judicial department by the Constitution, is as free from encroachment by the legislative and executive branches of the government as are the legislative and executive powers respectively vested in the Congress and the President free from encroachment by the judicial department.

The complaint herein sets forth a valid cause of action under an historic head of equity jurisdiction. Grounds exist for a court of equity to restrain the enforcement of an alleged unconstitutional statute when it appears from the complaint: (a) that the jurisdictional requirements of the

amount in controversy are satisfied; (b) that there exists a substantial federal constitutional question; (c) that under the Act challenged criminal penalties would attach to each violation thereof; (d) that the prevention of criminal proceedings under an alleged unconstitutional statute is essential to safeguard rights of property; (e) that the danger of irreparable loss to plaintiffs is both great and immediate; (f) that the criminal statute would cripple the plaintiffs' business by threatening a multiplicity of criminal prosecutions or by imposing repeated heavy fines, and (g) that the plaintiffs may not be in a position to try the issue in the criminal proceeding. *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Gibbs* v. *Buck*, 307 U. S. 66 (1939); and other cases above cited.

Measured by these firmly established principles, it is apparent that the complaint sets forth facts sufficient to invoke equity jurisdiction to restrain enforcement of the Act pending determination of its validity by the judicial branch of the government. The complaint shows that the amount in controversy as applies to each appellant exceeds the jurisdictional amount, that there exists a substantial constitutional question as to the validity of the Act and the regulations promulgated thereunder, that under the Act criminal penalties would attach to each violation thereof, that the prevention of criminal proceedings is essential to safeguard appellants' property rights and to prevent a multiplicity of criminal prosecutions which would cripple the business of the appellants, that appellants may not be able to raise at the criminal trial the issue of the validity of the Act and of the regulations issued by the Administrator purporting to act under authority of the challenged legislation, and that irreparable loss and damage would result to appellants from the

continuation of the prosecution of the enforcement of the Act and the regulations promulgated thereunder (R. 8 to 30).

The allegations of the complaint were admitted by the motion to dismiss, which admits all well pleaded facts. *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

In circumstances similar to, (and in many cases less strong than), those appearing in this case, this court has repeatedly held that the equity jurisdiction has been properly invoked. In *Gibbs* v. *Buck*, 307 U. S. 66 (1939), Mr. Justice Reed said (307 U. S. 76):

> "The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction. Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below. Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied."

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), this Court, in reversing the refusal of a three-judge district court to enjoin enforcement of the National Industrial Recovery Act of June 16, 1933, withdrawing "hot oil" from interstate shipment, declared (293 U. S. 414):

> "The statute provides that any violation of any order of the President issued under § 9 (c) shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both. *We think that these penalties would attach to each violation, and in this view the plaintiffs were entitled to invoke the equitable jurisdiction to restrain enforcement, if the statute and the Executive orders were found to be invalid.* Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620, 621; Terrace *v.* Thompson, 263 U. S. 197, 214-216; Hygrade Provision Co. *v.* Sherman, 266 U. S. 497, 499, 500."*

In *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194 (1934), a three-judge district court was convened to consider a complaint filed to enjoin the enforcement of the New York Milk Control Law of April 10, 1933. The district court dismissed the complaint on defendant's motion. This Court in reversing the judgment of the district court in dismissing the complaint said (293 U. S. 208):

> "But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court."

and unanimously held, at page 213:

> "While the complaint is lacking in the specific and definite allegations as to trade conditions which would be appropriate to the plaintiff's assertions in

* Italics supplied unless otherwise indicated.

supporting its attack on the statute, we think that the plaintiff should not be refused standing in court upon the allegations made. As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½".

See also *Campbell* v. *Medalie,* 71 F. (2d) 671 (C. C. A. 2nd, 1934).

It being apparent that the complaint herein sets forth a cause of action cognizable by a court of equity, the propriety of the action of the court below in dismissing the complaint and in holding that Section 204(d) of the Emergency Price Control Act of 1942 denied the court jurisdiction and power to consider the complaint and grant the relief prayed for, will now be considered.

Before considering the validity of the action of the lower court, however, and in order to avoid any misunderstanding, it should be pointed out that the appellants do not question the right of Congress, as a war measure, to regulate prices or to take their property entirely within the limits provided by the Constitution. It is appellants' contention that this case raises only questions of law and does not require any discussion of patriotism or of the power of our federal government under the Constitution to prosecute efficiently the present war. The Fifth Amendment was adopted as a limitation upon every power granted to the federal government, including the power to wage war. In the emergency created as a result of the present world-wide war, the courts should zealously regard those rights granted to each citizen by the Constitution. *Ex Parte Milligan,* 4

Wall. 2 (1866); *U. S.* v. *L. G. Cohen Grocery Co.*, 255 U. S. 81 (1921). Appellants' contention is simply that they be not deprived of their property without due process of law. They should be given an opportunity to test the validity of the Emergency Price Control Act and the regulations promulgated thereunder in accordance with time honored procedure within the constitutional judicial power of the federal courts, before being subjected to criminal trial and possible conviction with the resultant irreparable loss of liberty and damage to their property.

POINT I.

The lower court erred in holding that Section 204(d) of the Emergency Price Control Act of 1942 withdrew from the court jurisdiction and power to entertain the complaint and grant the relief prayed for and in dismissing the complaint for want of jurisdiction.

A.

Section 204(d) as construed and applied by the Court below is unconstitutional in that it infringes upon the judicial power of the federal courts of equity in violation of Article III, Section 1 of the Constitution of the United States.

Article III, Section 1 of the Constitution of the United States provides: "The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, Section 2, Clause 1, provides: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *".

The plain language of these provisions and the decisions of this Court demonstrate conclusively that the judicial power is vested exclusively in this Court and such inferior courts as may be established by Congress. *Martin* v. *Hunter's Lessee*, 1 Wheaton 304 (1816); *United States* v. *Klein*, 13 Wallace 128 (1872).

This vesting of the judicial power in one coordinate and independent branch of the federal government was not done by the framers of our Constitution by mere chance. It was done deliberately from a full knowledge of the history of the English judiciary and out of an abundance of experience acquired under the colonial governments before the Revolutionary War.

From the doctrine of the separation of powers springs the immunity from legislative control of all inherent and essential elements of judicial power. *United States* v. *Klein*, 13 Wallace 128 (1872); *Michaelson* v. *United States*, 266 U. S. 42 (1924). This immunity is analogous to that of the executive from interference with his inherently executive power. See *United States* v. *Klein*, 13 Wallace 128, (1871); *Myers* v. *United States*, 272 U. S. 52 (1926); *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935).

It is beyond question that the power of judicial review is an essential attribute of the judicial power given to the courts by the Constitution. In *Marbury* v. *Madison*, 1 Cranch 137 (1803), Chief Justice Marshall said (1 Cranch 176):

> "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply."

In *Ableman* v. *Booth*, 21 How. 506 (1858), Chief Justice Taney declared (21 How. 520):

"The judicial power covers every legislative act of Congress whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachments upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an Act of Congress is not pursuant to and within the limits of the power assigned to the federal government it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any Act of Congress is brought before them and it is their duty to declare the law void and refuse to execute it if it is not pursuant to the legislative powers conferred upon Congress * * *."

Again in *Gordon* v. *United States*, 117 U. S. 697, Chief Justice Taney said (p. 705):

> "Whether an Act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution."

There can be no doubt that the power of a federal court of equity to restrain the enforcement of a statute alleged to be unconstitutional pending judicial determination of its constitutional validity is a necessary attribute of the inherent judicial power granted exclusively to the federal courts by the provision of the Constitution above quoted. See *Porter* v. *Investor's Syndicate*, 286 U. S. 461 (1932), where this court in interpreting a provision of the Montana Blue Sky Law so as not to prevent the grant of a stay during review of an order revoking a license, declared that a contrary interpretation would constitute a denial of due process. See also *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923), and *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923), where it is stated that the refusal of interlocutory relief to a public utility claimed to be daily suffering from confiscation from rates set by a Commission, would be a denial of a constitutional right.

In *A.P.W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935), the court denied the motion of the government to dismiss the complaint which sought to restrain the Collector of Internal Revenue from collecting processing taxes under the Agricultural Adjustment Act of May 12, 1933 as amended by the Act of May 9, 1934. In disposing of the government's contention that the act which provided "no suit, action or proceeding (including probate, adminis-

tration, receivership and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed * * * on or after the date of this amendment * * *", denied the court jurisdiction to entertain the action, the court said (12 F. Supp. 742):

> "But that the Congress may by unconstitutional statutes, denominated a tax law, take the property of the citizen without due process of law and then in the same statute forbid the citizen to seek injunction in a court of equity without giving him an adequate remedy at law has yet to be established by the highest authority. There are authorities which at least inferentially hold to the contrary. Nichols *v.* Coolidge, 274 U. S. 531, 542, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081; Brinkerhoff-Faris Trust & Savings Co. *v.* Hill, 281 U. S. 673, 679, 50 S. Ct. 451, 74 L. Ed. 1107; Graham & Foster *v.* Goodcell, 282 U. S. 409, 431, 51 S. Ct. 186, 75 L. Ed. 415.
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> * * * * * *
>
> If this AAA statute transcends the delegated powers of the federal government and is therefore unconstitutional, or if it is unconstitutional solely because of the prohibited delegation of legislative power to the executive branch of the government, or for any other reason, the whole tax scheme of the statute must fall before the constitutional bar, and section 21 (a) restraining injunction on equity against the collections would seem to fall with it.
>
> Were it otherwise, Congress could by unconstitutional legislation under the guise of a tax law, take the property of the citizen without due process of law, or otherwise deprive the citizen of his constitutional rights, and by the mere device of prohibiting in such legislation redress at law or suit in equity,

could prevent the citizen from seeking and the courts from granting redress, and there would be no possible way of having a judicial determination of the constitutionality of the statute or of preventing the collection of taxes unconstitutionally exacted or of recovering such taxes or of preserving the constitutional rights of the citizen.

* * * * * * *

"Congress may not encroach upon the equity jurisdiction of the court intended by the Constitution. Michaelson *v.* United States, 266 U. S. 42, 64, 45 S. Ct. 18, 69 L. Ed. 162, 35 A. L. R. 451."

In *Winston & Co.* v. *Georgia & F. R. R.*, 34 F. (2d) 163, (D. C. W. D. So. Car. 1929), the Court said (34 F. (2d) 167):

"The equitable jurisdiction of a federal court is derived from the Constitution, and cannot be limited either by state statutes or acts of Congress."

In *In re Cleveland & Sandusky Brewing Co.*, 11 F. Supp. 198 (D. C. N. D. Ohio 1935) the Court said (11 F. Supp. 206):

"Save in respect of equitable rights arising under the Constitution, the Congress has the power to limit the jurisdiction of the court of equity in respect of the issuance of injunctions * * *"

In that case, the Court held that notwithstanding the provisions of 47 Stat. 70, 71, commonly known as the Norris-LaGuardia Act, which denied to any court the right to issue injunctions in certain enumerated circumstances, it could nevertheless issue an injunction to preserve and protect the property committed to it under the provisions of the bankruptcy act to prevent irreparable loss and damage.

Not only the cases abovementioned but also the cases cited in the introductory statement establish that the power

of a court of equity to restrain enforcement of an alleged unconstitutional statute pending judicial determination of its validity is an attribute inherent in the judicial power vested exclusively in the judicial department by the Constitution. This being so, it is clear that Congress has no power to destroy or infringe upon this aspect of judicial power.

In *United States* v. *Klein*, 13 Wall. 128 (1871), there was up for consideration the Act of Congress which provided in substance (13 Wall. 143):

> "* * * that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or accep-

tance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed."

In holding this act unconstitutional as an attempt by the Legislature to infringe upon the judicial power, Chief Justice Chase said (13 Wall. 146):

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

* * * * * *

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction 'The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.'

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the court of claims on appeal. Can it prescribe a

> rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

In *Michaelson* v. *United States*, 266 U. S. 42 (1924), this Court said (266 U. S. 64):

> "If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect to its validity would be presented * * *."

In that case, the court pointed out that notwithstanding the control of Congress over the inferior federal courts, it cannot adopt a statute which will render practically inoperative the power of those courts to function, the court saying that (266 U. S. 66):

> "The attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

In the light of these authorities we turn to an examination of the challenged act. The pertinent part of Section 204(d) provides that:

> "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or

price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

It is clear that this section is nothing more than a legislative attempt, under the guise of its admitted power to regulate the jurisdiction of the lower federal courts, to infringe upon the judicial power of a court of equity to grant an injunction to restrain the enforcement of an unconstitutional act.

The lower court, in construing and applying this section, held that it deprived it, and necessarily all lower federal courts sitting in equity, of the constitutional judicial power to enjoin the enforcement of the act even though it be unconstitutional.

If Congress can constitutionally deprive all courts of jurisdiction and power to restrain the enforcement of one unconstitutional act, thus in effect imposing upon the courts a rule of decision that in all circumstances in all actions brought to enjoin the enforcement of the Act the courts must hold the act constitutional, there would be no constitutional barrier to Congress doing likewise with respect to all Congressional enactments. Nor would there then be any limitation upon the power of Congress to provide that no lower federal court has the jurisdiction or power to hold any act of Congress unconstitutional, thus in effect imposing upon the courts a rule of decision that in all cases where an act of Congress is brought into question, the courts must declare the act constitutional. Nothing would then prevent Congress from denying this Court appellate jurisdiction where the validity of an act of Con-

gress has been brought into question. Thus, if Congress has the power accorded to it by the judgment of the court below, nothing could prevent it from utterly destroying the judicial power vested exclusively in the judicial department of the federal government.

Obviously this is not the law. Congress may not, in the guise of defining the jurisdiction of a court, impose upon it a rule for deciding a case or controversy.

In view of Article III, Section I, and the cases cited herein, it is submitted that Section 204(d) as construed and applied by the lower court is unconstitutional and the judgment of that court should therefore be reversed.

B.

Section 204(d) as construed and applied by the lower court is unconstitutional because it deprives appellants of their property without due process of law in violation of the Fifth Amendment.

In addition to the reasons set forth under A herein, it is submitted that Section 204(d) as construed and applied by the lower court is unconstitutional as being in conflict with the Fifth Amendment in that it deprives appellants of their property without due process of law.

It has been shown in the introductory statement to this Point that a federal court of equity will restrain the enforcement of an alleged unconstitutional statute in the circumstances disclosed in the complaint herein. The part of the Act in question, quoted under A herein, purports to deny that power to all Courts, Federal, State, or Territorial.

Whenever Congress has enacted legislation withdrawing from a court the power to act, the courts have examined the particular statute involved in order to determine whether the judicial power has been vested in another tribunal in a

manner adequately protecting the party affected. Thus, in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), where a limited amount of jurisdiction was withdrawn from a district court to enjoin certain activities under the National Labor Relations Act, this Court said (303 U. S. 48):

> "The grant of that exclusive power is constitutional because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals adequate opportunity to secure judicial protection against possible illegal action on the part of the Board."

And concluded by saying (303 U. S. 50):

> "Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. Anniston Mfg. Co. v. Davis, 301 U. S. 337, 343-346."

An examination of Section 204 of the Act demonstrates conclusively that no other adequate remedy has been provided. After providing in Section 204(a) that any person who is aggrieved by the denial of a protest made to the Administrator may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals created pursuant to sub-section (c) thereof, it is provided in sub-sections (b) and (c) as follows:

> "(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part,

any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."

"(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. • • •".

These statutory provisions limit the jurisdiction of the Emergency Court of Appeals to a review of any regulation or order promulgated by the Price Administrator and then only in cases where a protest has been filed with the Administrator under Section 203 of the Act and the protest has been denied by the Administrator. While in sub-

section (b) the Act would seem to give the Emergency Court of Appeals the power to enjoin or set aside any regulation, order or price schedule promulgated by the Administrator where it appears that it is not in accordance with law, or is arbitrary or capricious, nowhere is the Emergency Court of Appeals given the power to enjoin the enforcement of the Act. Furthermore, this limited grant of power to enjoin any order or regulation is illusory. It is nullified because section (b) goes on to provide that:

> "* * * The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof".

Section (b) then further provides that if a petition for a writ of certiorari is filed with this court within such thirty days, the effectiveness of such judgment shall be postponed until an order denying such petition becomes final or until other final disposition of the case by this court.

Taken in connection with the provisions of section (c), that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining in whole or in part the effectiveness of any regulation or order promulgated by the Administrator, it is clear that the Emergency Court of Appeals, although called a court, is merely another agency in the administrative process.

This is made even more clear, if anything further is necessary, by the proviso in sub-section (a) that the Administrator may at any time modify or rescind any regulation, order or price schedule, notwithstanding the pendency of a complaint in the Emergency Court of Appeals. These provisions clearly demonstrate that the Emergency Court

of Appeals is a court in name only. It lacks the one fundamental essential of a court. There is no finality to the judgments it renders. The capacity to render a final decision on all the issues before it which will be conclusive upon the parties is the distinguishing characteristic of judicial power. Without such finality of decision the power exercised is not judicial power. See *Hayburn's Case*, 2 Dallas 409 (1792); *United States* v. *Ferreira*, 13 How. 39 (1851); *Gordon* v. *United States*, 117 U. S. 697 (1864); *United States* v. *Jones*, 119 U. S. 477 (1886); see also *Pocono Pines etc.* v. *The United States*, 73 Court of Claims, 447 (1932).

Since the Emergency Court of Appeals (a) has no power to enjoin the enforcement of the Act (b) is denied the power to issue any temporary restraining order enjoining the effectiveness of any regulation or order promulgated under the Act, and since (c) any judgment of the Court holding any regulation or order invalid is inoperative for a period of thirty days it is clear that it is not a court and can only be considered part of the administrative process established by the Act.

In addition, the administrator can nullify any action of the Emergency Court of Appeals by resorting to two obvious expedients conveniently placed at his disposal—he could file an application for a writ of certiorari to this Court which would stay the operation of the judgment of the Emergency Court of Appeals or he could render the judgment utterly void by modifying or rescinding the regulation or order deemed to be invalid by the Emergency court, and the aggrieved party would then have no other recourse but to start all over again by filing a protest with the Administrator. This procedure could be continued indefinitely during which time the aggrieved party's property could be utterly destroyed. Under the construction placed

upon Section 204(d) by the court below, he would be without any remedy whatsoever to protect himself and his property.

It requires no argument to demonstrate that Section 204(d) as thus construed and applied by the lower court deprives an aggrieved party of his property without due process of law in violation of the Fifth Amendment. It has been repeatedly held by this court that a person is entitled to equitable relief by way of injunction restraining the enforcement of an alleged unconstitutional statute where his property is being confiscated, in order to prevent irreparable loss and damage pending judicial determination of the challenged legislation. *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924); *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290 (1923); *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43 (1923); *Mt. States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167 (1936); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).

In *Porter* v. *Investors Syndicate, supra*, Mr. Justice Roberts said (p. 471):

> "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440, 454. But where either the plain provisions of the statute (Pacific Teleph. & Teleg. Co. *v.* Kuykendall, 265 U. S. 196, 203, 204) or the decisions of the state court interpreting the act (Oklahoma Natural Gas Co. *v.* Russell, 261 U. S. 290) precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in

cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

And it has been held that statutes which deny an injunction to a public utility pending review of the fairness of a rate order are unconstitutional under the due process clause. *Mt. States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167 (1936); *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924).

Finally, the statutory provision referred to (Section 204(a)) gives the right to protest only a regulation or order of the Administrator. There is no right to protest if the Administrator fails to act. Similarly, the right of review in the Emergency Court of Appeals, just discussed, is limited to a review of regulations and orders promulgated by the Administrator.

The gist of the complaint in the present case is that the Act requires "non-action" on the part of the Administrator with respect to live stock, that in any event he has not acted with regard thereto, and that the provisions of the Act set up a scheme and device with respect to the meat industry which is discriminatory and confiscatory, thereby destroying and taking the property and businesses of the appellants.

There is no method under the Act whereby a person may protest such "non-action" of the Administrator. Is a person thus aggrieved denied any and all relief in any court? Must he sit by, although his constitutional rights have been invaded and his business destroyed? Can it be said that as to that kind of situation, the district court is deprived of jurisdiction by virtue of the provisions of the Act just adverted to?

The invalidity of the Act becomes doubly apparent in the light of the decision of the Alabama Supreme Court in *Kittrell* v. *Hatter*, 10 So. (2d) 827 (Nov. 1942) holding that Section 204(d) deprived the state courts of jurisdiction over an action to enjoin enforcement of the Act. The decision of the Alabama court is predicated upon the principle that Congress may withhold from state courts jurisdiction over a matter within the judicial power of the United States. It is well settled, however, that the jurisdiction of state courts in respect to federal questions may be eliminated by Congress only where it chooses to make the federal jurisdiction exclusive. *Martin* v. *Hunter's Lessee*, 1 Wheaton 304 (1816); *Gaines* v. *Fuentes*, 92 U. S. 10 (1875); *Plaquenines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511 (1898). It therefore follows that the denial of jurisdiction to the state courts must be predicated upon the grant of exclusive jurisdiction to the federal courts. Since Section 204(d) as construed by the lower courts denies to the federal courts jurisdiction to enjoin the enforcement of the Act, it is unconstitutional because, as so construed, there is no court, either state or federal, in which an aggrieved party may obtain relief against the danger of irreparable loss and damage pending the judicial determination of the validity of the challenged statute.

The suggestion contained in the majority opinion of the lower court that Section 204(d) of the Act does not preclude a person from raising the defense of the unconstitutionality of the Act to any action brought against him under the Act, does not save Section 204(d) from the constitutional infirmity herein discussed. If a party must wait to question the validity of an Act until proceedings have been brought against him, no argument is required to demonstrate that until such proceedings are brought against him, he may suffer irreparable loss and damage. Under the

cases discussed herein that would constitute a deprivation of his property without due process of law in violation of the Fifth Amendment.

C.

Section 204(d) deprives appellants of their right at the trial of the indictments found against them to raise as a defense the invalidity of the regulations issued by the Price Administrator, thus depriving appellants of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and denies to appellants a full, fair, complete and impartial trial on all the issues involved on the indictments returned against them within the State and district wherein the alleged crimes were committed, in violation of Article III, Section 2, Clause 3, of the Constitution of the United States and in violation of the Sixth Amendment to the Constitution of the United States.

The District Court of New Jersey, by the provisions of Title 28, U. S. C., Section 41(2), has jurisdiction "of all crimes and offenses cognizable under the authority of the United States".

Section 205(c) of the Emergency Price Control Act provides that:

> "The District Court shall have jurisdiction of criminal proceedings for violations of Section 4 of this Act".

Article III, Section 2, Clause 3 of the Constitution provides:

> "The trial of all crimes • • • shall be held in the state where the said crimes shall have been committed".

And the Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the state and district wherein the crime shall have been committed * * *".

By these provisions appellants must be tried in the district within which the offense is charged to have been committed. *United States* v. *Jackalow*, 1 Black 484 (1861). By force of these provisions and the 5th Amendment, appellants are guaranteed a trial according to the settled rules of the common law. In *Callan* v. *Wilson*, 127 U. S. 540 (1888), this Court said (127 U. S. 549):

> ". . . the guarantee of a trial by jury in the Third Article implied a trial in that mode and according to the settled rules of the common law; the enumeration in the Sixth Amendment of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have, in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

In *Chambers* v. *Florida*, 309 U. S. 227 (1940), this Court said (309 U. S. 235):

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—*just as that in the Fifth*—has led few to doubt that it was intended *to guarantee procedural standards adequate and appropriate*, then and thereafter, to protect, at all times, * * *".

In *Edwards* v. *United States*, 312 U. S. 473 (1941), this Court declared (312 U. S. 482):

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeletion which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

Again in *Adams v. United States*, 317 U. S. (Ad. Op.) 269 (1942), this Court again declared (317 U. S. (Ad. Op.) 275):

> "Certain safeguards are essential to criminal justice. * * * But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property'.
>
> * * * * * *
>
> "The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

From these pronouncements, it is apparent that this Court has repeatedly emphasized the safeguards which a

person accused is entitled to at a criminal trial. It is well settled that an indictment based upon an invalid law is no indictment at all. In *Ex Parte Royall*, 117 U. S. 241 (1886), this Court said (117 U. S. 248):

> "But with respect to the other propositions, it is clear that if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceedings against him is a nullity. As was said in *Ex parte* Siebold, 100 U. S. 376, 'An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous but is illegal and void and cannot be a legal cause of imprisonment.'"

By force of the same reasoning, it is equally clear that if the regulation under which a person is indicted is invalid or repugnant to the Constitution, the entire proceedings against him is a nullity.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), Mr. Justice Stone said (304 U. S. 152):

> "We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

It follows from the foregoing decisions, therefore, that every person accused of crime must be given the opportunity on the trial of the indictment to put in question the validity of the regulation, order or act under which the indictment is founded. The appellants here, therefore, are

entitled, as a matter of constitutional right, to establish by the production of all evidence necessary to prove their contention that the regulation set forth in the indictments is invalid. Unless they are afforded this right, it is clear that their constitutional rights have been violated.

A denial of this right under the present circumstances would be particularly onerous in view of the following testimony of Price Administrator Brown before the Small Business Committee of the House:[1]

> "The Chairman: Do you believe that law has been complied with, Mr. Brown?
>
> Mr. Brown: It is difficult for me to answer, Mr. Chairman. I think, to be perfectly frank, that it could be said that our regulation at times is in violation of that law, particularly that at the present time with respect to small packers. Now it is very largely a question of judgment. I don't know how or where you can draw the line and say so many small packers will of necessity fall down under a legal administration."

Although the appellee stated at the argument in the court below that a person may challenge the validity of the Act by way of defense on the trial of an indictment founded upon the Act and the regulations promulgated thereunder, it was not suggested at any time that the validity of the regulations promulgated by the Administrator could be questioned as part of the defense interposed at the trial of the indictments.

The complaint alleges that indictments have been returned against appellants wherein they are charged with

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[1] Hearings before the Select Committee to conduct a study and investigation of the National Defense Program in its relation to small business in the United States House of Representatives, Seventy-eighth Congress, First Session on H. Res. 18, April 8 and 9, 1943, Part 5 (Unrevised).

violating (in the State of New Jersey) Section 4 of the Act and certain regulations promulgated under the Act. It is further alleged that the appellants have, by appropriate pleadings, challenged the validity of certain indictments asserting, *inter alia* (a) that they do not charge a crime against the United States; (b) that the Act upon which they are based is unconstitutional; (c) that the regulations upon which they are based are unconstitutional. It is also alleged in the complaint that because of the unconstitutionality of the Act, and the regulations promulgated thereunder are not in some respects patent, but must be established by competent evidence which can be produced, the trial court may decline to pause in said trial upon said indictments to receive such evidence and appellants thereby will be unable adequately and properly to present such issues to the trial court.

Where the invalidity of a statute or regulation promulgated thereunder can only be demonstrated by an extensive examination of complicated facts, this Court has declared that a trial on a criminal indictment for violating the act would furnish no adequate opportunity for the presentation of such defense. In *Ex Parte Young*, 209 U. S. 123 (1907) Mr. Justice Peckham said (209 U. S. 164):

> "If, however, one should be found [an indictment] and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. • • • Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate

opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid.

"We do not say the company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible.

"To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take."

Section 204(d) which purports to deny the trial court of the power to determine and decide the challenges to the validity of the indictments interposed by the appellants, is clearly unconstitutional as being repugnant to Article III, Section 2, Clause 3 of the Constitution and the Fifth and Sixth Amendments thereto, therefore a proper case is presented for the interposition of a court of equity to restrain the enforcement of the Act pending judicial determination of its validity.

See *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203 (1937), where Mr. Justice Cardozo said (300 U. S. 214):

"'Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' Davis *v.* Wakelee, 156 U. S. 680, 688. * * * *A remedy at law does not exclude one in equity, unless it is equally prompt and certain and in other ways efficient.* * * *"*

D.

Section 204(d) being an integral part of the Act is invalid because of the invalidity of the substantive provisions of the Act.

The complaint herein challenges not only Section 204(d) of the Act but also challenges the substantive provisions purporting to grant to the Price Administrator the power to fix maximum prices and placing arbitrary limits on the Administrator's power to establish any maximum price for any agricultural commodity including livestock. Under Points II and III herein the unconstitutionality of these substantive provisions are discussed. If the substantive provisions of the Act are unconstitutional, Section 204(d) which is an integral part thereof must likewise be rendered invalid even though the Act states that if any provision of the Act is declared unconstitutional the remainder of the Act shall not be affected thereby. *Hill* v. *Wallace*, 259 U. S. 44 (1922), *U. S.* v. *Reese*, 92 U. S. 214 (1875), *Champlin Refining Co.* v. *Commission*, 286 U. S. 210 (1932), *Williams* v. *Standard Oil*, 278 U. S. 235 (1929).

A situation similar to that existing in the present case existed with respect to the Agricultural Adjustment Act of May 12, 1933, as amended by the Act of May 9, 1935. That Act provided that:

> "No suit, action or proceeding (including probate, administration, receivership and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed * * * on or after the date of this amendment."

Notwithstanding this provision of the Act, in *A. P. W. Paper Co.* v. *Riley*, 12 F. Supp. 738 (D. C. N. D. N. Y. 1935),

the Court enjoined the collection of the taxes assessed thereunder both before and after the amendment, saying (12 F. Supp. 742):

> "If this AAA statute transcends the delegated powers of the federal government and is therefore unconstitutional, or if it is unconstitutional solely because of the prohibited delegation of legislative power to the executive branch of the government, or for any other reason, the whole tax scheme of the statute must fall before the constitutional bar, and section 21(a) restraining injunction on equity against the collections would seem to fall with it."

POINT II.

The Emergency Price Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the administrator in violation of Article 1, Section 1 of the Constitution. The Act sets no policy or standard sufficiently definite to guide the administrator in the exercise of the delegated powers.

The constitutional principle is fundamental that the legislature may not abdicate its function and delegate purely legislative functions to the executive department of the Government.

Field v. *Clark*, 143 U. S. 649 (1892);
J. W. Hampton, Jr. & Co. v. *United States*, 276 U. S. 394 (1928);
Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935);
Schechter Corp. v. *United States*, 295 U. S. 495 (1935).

This principle was summarized in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), where Mr. Chief Justice Hughes said (293 U. S. 421):

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, Par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, can not be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

The foregoing case involved Section 9(c) of the National Industrial Recovery Act, which authorized the President "to prohibit transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from stor-

age by any State Law or valid regulation or order prescribed thereunder, by any board, commission, officer, or any other duly authorized agency of a state". In declaring this provision unconstitutional on the ground that it constituted an unauthorized delegation of legislative powers to the President, the Court said (293 U. S. 430):

> "We think that §9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> "If §9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

Schechter Corp. v. *United States*, 295 U. S. 495 (1935), involved the validity of Section 3 (a) of the National Industrial Recovery Act, authorizing the President to approve codes of fair competition "for trades and industries". The Statute provided that codes may be approved upon application of one or more trades or industrial groups, if the President found (1) that such associations impose no inequitable restrictions on membership, and are

representative, and (2) that the codes are not designed to promote, monopolize or to eliminate small industries or to discriminate against them. It further provided that the President may as a condition of approval of any code, impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interests, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

In holding that such a sweeping delegation of legislative power found no support in the decisions of the Supreme Court, the Court said (295 U. S. 541):

> "To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, §3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

Applying the principle of these cases to the present case, the conclusion is inevitable that the Emergency Price Con-

trol Act must be declared unconstitutional as an improper delegation by Congress of its legislative functions. By this Act Congress has conferred upon the Administrator not merely the power to fill up the details in the general scheme of the Act, or to exercise the administrative function of applying a general principle or standard, but complete and comprehensive authority to determine what the Act shall include, when it shall begin to operate, and when price schedules, regulations, or orders shall terminate.

The general purposes of the Act are stated in Section 1 (a) as follows:

> "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

In order to carry out the stated purposes of the Act Congress has delegated to the Administrator in section 2 (a) virtually complete discretion in the matter of fixing maximum prices. Section 2 (a) provides:

> "Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. * * * Before issuing any regulation or order * * * the Adminis-

trator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. * * * Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2 (c) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

By Section 2(h) of the Act it is further provided that the powers granted by Section 2 shall not "be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry".

It will thus be seen that under the provisions of this Act the power to determine on what commodities price ceilings should be placed is wholly discretionary and not mandatory. Although Section 2(a) uses the word "shall" when dealing with the ascertainment and consideration of prices prevailing on any date and for the making of adjustments, it, nevertheless, provides that in establishing any maximum price the Administrator shall do so only so far as practicable. Whatever mandatory effect these words may have is completely emasculated by Section 2(c) which, it should be observed, provides that any regulation may be established in such form and manner, contain such classifications and differentiations, and provide for such adjustments and exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This latter provision, when considered with the words "so far as practicable", clearly shows that the Administrator is not compelled to follow any specified or certain standard but may fix any price which he may choose without taking into consideration any of the elements specified in Section 2(a). Thereby no mandatory standard is established by the Act.

Moreover, there is no requirement in the Act that the Administrator must fix a price ceiling on every commodity which rises or threatens to rise. He may fix ceilings on some commodities and leave others alone. He may, under the terms of the Act, even differentiate between commodities in the same class. Thus, he may fix a ceiling on the price of chickens but not on ducks or geese. In addition, he may terminate any price schedule whenever he wishes and reimpose a ceiling whenever he chooses. This gives him such an unbounded discretion, in the words of Justice Cardozo as to amount to "delegation running riot".

Thus, the Administrator has not only been given the power to determine what prices should be fixed and what commodities should be covered by the price ceilings, but also the power to determine when a price ceiling shall begin and when it shall terminate. Congress has thereby failed to define the circumstances and conditions under which the Administrator should act and in the same manner Congress has failed to set up any standard sufficiently definite to guide him in his determination as to the period for which each price ceiling should exist.

Nor is the Administrator obliged to depend upon any specified procedure for the determination of the circumstances and conditions under which the ceiling is to be imposed or discontinued. Even fixing of the price ceiling is left to the uncontrolled discretion of the Administrator. Although Section 2(a) provides that consideration should be given to the prices prevailing between October 1 and October 15, 1941 and that he shall make adjustments for such relevant factors as he might determine and deem to be of general applicability, such as speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of commodities during and subsequent to the year ended October 1, 1941, as we have already pointed out, he is not compelled to act upon such facts. All he is required to do is to consider them. So long as he considers them he may disregard them completely. Again, this is not sufficient to provide a certain or definite standard for the setting of a price ceiling.

Nor can it be reasonably argued that the exercise of the powers conferred by the Act is merely a ministerial function delegated to the Administrator. If he may set a ceiling or unmake it, if he may apply it to all or none of the commodities sold in this country, if he may extend it

to competing commodities or restrict it to enumerated commodities, if he may begin and end its application and determine its duration, if he may fix the extent of the ceiling, then and under such conditions the powers exercised by him cannot be said to be merely administrative but are, without question, discretionary. As such they clearly violate the constitutional prohibition against the delegation of powers for by their exercise it is the Administrator and not Congress who performs the legislative function. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Corp.* v. *United States*, 295 U. S. 495 (1935).

It is submitted under this point that the Emergency Price Control Act of 1942 as amended by the Inflation Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator.

POINT III.

The Emergency Price Control Act makes an unconstitutional, discriminatory classification in fixing prices on agricultural commodities and commodities processed or manufactured from any agricultural commodity.

The general scheme for fixing maximum prices on commodities is provided in Section 2(a) of the Act which purports to authorize the Administrator to establish such price ceilings on commodities as in his judgment shall be generally fair and equitable and will effectuate the general purposes of the Act.

The power conferred by Section 2 is restricted, as provided in Subsection (f) thereof, in accordance with the provisions of Section 3. An analysis of that Section demonstrates that in an industry such as the meat industry

the Act provides for two classifications of the products of the industry, *i. e.*, live stock and dressed meats, as to which there are different levels or standards of prices.

The classification of the industry's products into livestock and dressed meats comes about through the use of the phrase "agricultural commodity" in Section 3, Subsections (a), (b), (e) and the phrase "commodity processed or manufactured in whole or substantial part from any agricultural commodity" in Section 3(c).

Dressed meats and processed meats unquestionably are commodities processed or manufactured from an agricultural commodity, *i. e.*, livestock. Consequently, dressed and processed meats do not come within the price regulations of Section 3 which relate only to agricultural commodities and therefore these products are subject to the power of the Administrator to fix prices under Section 2(a).

The Act was amended by the Inflation Act of October 2, 1942, which maintained the same distinctions between agricultural commodities and products processed from agricultural commodities.

The scheme of the Emergency Price Control Act and the Inflation Control Act provides a special minimum standard for agricultural commodities by leaving unregulated the price of live stock to the extent (a) that its minimum price is not less than 110 per cent of the parity price as provided in section 3(a) of the Emergency Price Control Act or (b) that its minimum price is not less than the parity price as provided in section 3 of the Inflation Control Act. This last stated price standard is currently applicable with respect to agricultural commodities as the provisions of section 3(a) of the Emergency Price Control Act have been suspended by an executive order pursuant to authority granted by section 2 of the Inflation Control Act. These standards permit stock raisers to sell at an

unregulated price so long as it does not exceed parity, whereas the price of dressed and processed meats is fixed by the Administrator, which price may be and in fact is so out of line with the price of live stock, that it is unprofitable for slaughterers, under actual trade conditions, to purchase live stock for butchering and processing. The inevitable result of this discrimination is that the processors have to a great extent refused to slaughter since they can only do so at a loss.

The Act in making this arbitrary classification among operators within the meat industry produces a result whereby appellants' businesses are destroyed. The Act thus deprives them of their property by a discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment. *Currin* v. *Wallace*, 306 U. S. 1 (1939); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Wilson* v. *McDonnell*, 265 Fed. 432 (Ct. App. D. C., 1919); Writ of Error dismissed, 257 U. S. 665 (1921).

Live stock and dressed meats have a relationship such that a separate classification permitting a preferential treatment for live stock with respect to price produces a result most burdensome on slaughterers, wholesalers and other dealers in the meat industry. This Court, in *United States* v. *Carolene Products Company*, 304 U. S. 144 (1938), speaking of discriminatory classifications, said (304 U. S. 153):

> "• • • we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class is so different from others of the class as to be without the reason for the prohibition • • •."

It follows that a statutory classification which excludes one of a type of products having a close economic relationship may be shown to be such a discrimination as to amount to a deprivation of property in violation of due process under the Fifth Amendment.

In determining whether or not there is an arbitrary classification under the Act, the provisions of the Act must be considered in connection with the economic facts of the meat industry and their constitutionality must be viewed in the light of the peculiar facts of that industry. These facts are not before the Court and, if on this appeal it is determined that the district court of three judges to which appellants complaint was presented has jurisdiction to hear the matter the case should be remanded to the trial court to find the facts. *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194 (1934). In that case the constitutionality of the New York Milk Control Law of April 10, 1933, was in question. The law authorized the Milk Control Board to fix minimum prices for sales of fluid milk in bottles by milk dealers to stores in a city of more than 1,000,000 inhabitants. The Board established a differential of one cent a quart in favor of dealers not having a "well advertised trade name".

The decision of the district court granting a motion to dismiss the bill was reversed for the reason that the court failed to take into consideration any findings of fact to support its ruling. In commenting on the lack of evidence before the Supreme Court on appeal, Mr. Chief Justice Hughes said (293 U. S. 208):

> "But the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the com-

> plaint in the light of facts of which we may take judicial notice, but if, so read, it may be regarded as sufficient, the decision of this appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court."

The decree of the court below dismissing the complaint was reversed and the cause was remanded to that court for further proceedings.

Whether the provisions of the Act which permit the establishment of a price ceiling upon dressed meats and prevent the establishment of price ceilings on live stock constitute a denial of due process to appellants and others similarly situated cannot be determined by the Court on a motion to dismiss but must be adjudicated upon a trial where all the facts concerning the integration of the meat industry and the arbitrary classification between stock raisers and meat handlers may be presented to the trial court.

CONCLUSION.

For the reasons set forth herein it is respectfully submitted that the lower court erred in dismissing the complaint. Accordingly, the judgment of the lower court should be reversed.

Respectfully submitted,

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